

2 NOT FOR PUBLICATION

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Otis Bunn,) No. CV 09-0768-PHX-GMS (LOA)

10 Plaintiff,)

ORDER

11 vs.)

12 Maricopa County, et al.,)

13 Defendants.)
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16 Plaintiff Otis Bunn brought this civil rights action against Maricopa County Deputy
17 County Attorney Jennifer K. Linn and Attorney Corwin Townsend (Doc. #8).¹ Before the
18 Court is Defendants' Motion to Dismiss for failure to prosecute (Doc. #17), to which Plaintiff
19 did not respond. Also before the Court is Defendants' Motion for Ruling on their Motion to
20 Dismiss (Doc. #19).

21 The Court will grant Defendants' Motion to Dismiss, deny the Motion for Ruling as
22 moot, and terminate the action.

23 **I. Background**

24 Plaintiff initiated his action in Maricopa County Superior Court (Doc. #1).
25 Defendants removed the action to federal court, and, upon screening, the Court dismissed
26 Plaintiff's Complaint with leave to amend (Doc. ##1, 6).

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28 ¹The Court dismissed Maricopa County as a Defendant (Doc. #12).

1 Plaintiff then filed his First Amended Complaint, in which he set forth facts alleging
2 a false arrest claim (Doc. #8 at 3-3B).² Plaintiff alleged that he appeared in superior court
3 with Townsend, his court-appointed attorney, for a hearing on a pending criminal charge (id.
4 at 3A). Plaintiff stated that after the court hearing, Townsend convinced Plaintiff to enter a
5 conference room to talk (id.). Plaintiff alleged that while they were in the conference room,
6 Townsend's cell phone rang, and Plaintiff heard Linn's voice say "bring him out," at which
7 time Townsend motioned for Plaintiff to exit the conference room (id. at 3A-3B). Plaintiff
8 averred that upon exiting the room, he was detained and questioned by sheriff's deputies
9 regarding an unrelated criminal investigation (id. at 3, 3B). According to Plaintiff, Townsend
10 did not stay with Plaintiff during this questioning, which led to his arrest (id. at 3B). Plaintiff
11 alleged that Defendants conspired to deprive Plaintiff of his constitutional rights (id. at 3).

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13 The Court screened the amended pleading, ordered service on Linn and Townsend,
14 but provided that Defendants did not have to file an answer at that time (Doc. #12 at 4).
15 Because Plaintiff's criminal case was ongoing, and it appeared that Plaintiff's civil claim
16 related to rulings that would be made in the criminal trial, the Court directed Defendants to
17 file a brief with the Court providing an update of the status of Plaintiff's criminal case and
18 the applicability of Wallace v. Kato to Plaintiff's claim (id., citing 549 U.S. 384, 393 (2007)).
19 Under Wallace, if a plaintiff files a false arrest claim before a conviction, the district court
20 may stay the civil action until the criminal case is ended. 549 U.S. at 393. And if the
21 plaintiff is convicted, and the stayed civil action would impugn that conviction, the civil case
22 must be dismissed pursuant to Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). See
23 Wallace, 549 U.S. at 394.

24 Defendants filed a brief and a supplemental brief notifying the Court that criminal

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26 ²Although Plaintiff stated that his Fifth, Sixth, and Fourteenth Amendment rights were
27 violated and that his claim involved "unlawful conspiracy" (Doc. #8 at 3), his factual
28 allegations sufficiently stated a claim of false arrest/imprisonment in violation of the Fourth
Amendment. See Alvarez v. Hill, 518 F.3d 1152, 1157-58 (9th Cir. 2008) (a complaint need
not identify the statutory or constitutional source of a claim; it need only set forth factual
allegations supporting a claim for relief).

1 charges were filed against Plaintiff as a result of the arrest at superior court (Doc. #13 at 2).
2 Plaintiff pled not guilty to charges of fraudulent schemes and artifices and theft; in October
3 2009, he was tried and found guilty of those charges (id.; Doc. #16 at 1).³ Defendants assert
4 that since Plaintiff has been convicted of the crimes for which he was arrested during the
5 incident underlying the civil lawsuit, his civil claim is barred by Heck (Doc. #16 at 2).

6 In their briefs, Defendants also argue that, alternatively, Plaintiff's claim should be
7 dismissed because it is barred by the statute of limitations pursuant to Wallace (id.; Doc. #13
8 at 7). Defendants note that under Wallace, a false arrest claim accrues when a person is
9 detained pursuant to legal process, e.g., when he is bound over by a magistrate or arraigned
10 on charges (Doc. #13 at 5, citing Wallace, 549 U.S. at 391). Defendants state that Plaintiff's
11 arraignment was on October 3, 2005; thus, his Complaint, which was filed on November 19,
12 2008, came a year after the 2-year statute of limitations had passed (id. at 7).⁴

13 **II. Motion to Dismiss**

14 Defendants' instant motion seeks dismissal under Federal Rule of Civil Procedure
15 41(b), which provides that if a plaintiff fails to prosecute an action or comply with court rules
16 or orders, the defendant may move for dismissal (Doc. #17 at 3). Defendants point out that
17 in the Screening Order, the Court directed Defendants to file a brief regarding the status of
18 Plaintiff's criminal case, and it also directed Plaintiff to file a response to Defendants' brief
19 30 days after service of Defendants' brief (id. at 2). Defendants assert that Plaintiff did not
20 file a response brief or seek leave to extend the time to respond (id.).

21 Defendants contend that under the factors set out in Ferdik v. Bonzelet—which
22 consider the public interest, docket management needs, the risk of prejudice, and public
23 policy concerns—dismissal is appropriate (id. at 3-4, citing 963 F.2d 1258, 1260-61 (9th Cir.

25 ³Defendants submit a copy of the superior court Trial Minute Entry dated October 19,
26 2009, which documents the jury's guilty findings on the counts of fraudulent schemes and
27 artifices and theft (Doc. #16, Ex. A).

28 ⁴Defendants submit a copy of the superior court Not Guilty Arraignment form dated
October 3, 2005, which documents Plaintiff's presence before the Honorable Eartha K.
Washington and Plaintiff's plea to charges against him at that arraignment (Doc. #13, Ex. C).

1 1992)). They further contend that dismissal is warranted under Local Rule of Civil
2 Procedure 7.2(i)'s provision that allows failure to respond to a motion to be deemed a
3 consent to the granting of the motion (id. at 3). Finally, Defendants refer to the arguments
4 raised in their prior briefs that Plaintiff's claim is barred by the statute of limitations and,
5 alternatively, by Heck (id. at 4).

6 The Court issued an Order notifying Plaintiff of his obligation to respond to
7 Defendants' motion (Doc. #18). Plaintiff did not file a response to the motion.

8 Defendants then filed a Motion for Ruling, in which they move the Court to rule on
9 and grant the Motion to Dismiss based on Plaintiff's failure to respond to the motion (Doc.
10 #19). Plaintiff did not respond to this second motion.

11 **III. Failure to Prosecute**

12 It is well established that under Federal Rule of Civil Procedure 41(b), a district court
13 has authority to dismiss a plaintiff's action because of his or her failure to prosecute or to
14 comply with court orders. See Fed. R. Civ. P. 41(b); Link v. Wabash Railroad Co., 370 U.S.
15 626, 629-30 (1962) (holding that a court's authority to dismiss for lack of prosecution is
16 necessary to prevent undue delays in the disposition of pending cases and to avoid congestion
17 in the calendars of the district courts); Ferdik, 963 F.2d at 1260 (holding that a district court
18 may dismiss an action for failure to comply with any order of the court).

19 The Court also has discretion under Local Rule of Civil Procedure 7.2(i) to deem
20 Plaintiff's lack of response as a consent to the granting of Defendants' motion to dismiss.
21 Plaintiff was warned of this possibility (Doc. #18 at 2). The Ninth Circuit has upheld a
22 dismissal based on a failure to comply with a similar local rule in the District of Nevada. See
23 Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995).

24 Before dismissal for failure to prosecute or to comply with a local rule, the Court must
25 weigh "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to
26 manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring
27 disposition of cases on their merits; and (5) the availability of less drastic sanctions." Id. at
28 53 (quoting Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986)). If the court does

1 not consider these factors, the record may be reviewed independently on appeal for abuse of
2 discretion. Henderson, 779 F.2d at 1424.

3 The first three factors do not favor Plaintiff, particularly in light of the fact that
4 Plaintiff has ostensibly lost interest in prosecuting his action. There is no risk of prejudice
5 to Defendants to resolve the motion in their favor, and judicial efficiency also favors
6 resolution of this action. Public policy favors disposition of cases on their merits, so the
7 fourth factor weighs against dismissal. Pagtalunan v. Galaza, 291 F.3d 639, 643 (9th Cir.
8 2002). For the fifth factor, dismissal without prejudice is the least drastic sanction.

9 In sum, the five-factor analysis weighs in favor of dismissal. Plaintiff's failure to
10 respond will therefore be deemed as a consent to the granting of the motion. The Court need
11 not address Defendants' statute-of-limitations and Heck-bar arguments.⁵

12 **IV. Motion for Ruling**

13 Defendants' Motion for Ruling (Doc. #19), in which they request that the Court issue
14 its ruling on the Motion to Dismiss, is premature. Under Local Rule of Civil Procedure
15 7.2(l), such a request shall not be filed until a motion has been pending for more than 180
16 days. Regardless, given the Court's ruling on the Motion to Dismiss, Defendants' Motion
17 for Ruling is moot and will be denied.

18 **IT IS ORDERED:**

19 (1) The reference to the Magistrate Judge is **withdrawn** as to Defendants' Motion to
20 Dismiss (Doc. #17) and Motion for Ruling (Doc. #19).

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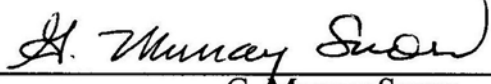
27 ⁵In light of the evidence of Plaintiff's arraignment in October 2005, more than three
28 years before initiation of this lawsuit, and of his subsequent conviction, Defendants'
arguments on the statute of limitations and Heck are well-taken and would also support
dismissal (see Doc. #13, Ex. C; Doc. #16, Ex. A).

1 (2) Defendants' Motion to Dismiss (Doc. #17) is **granted**; the action is dismissed
2 without prejudice pursuant to Federal Rule of Civil Procedure 41(b).

3 (3) Defendants' Motion for Ruling (Doc. #19) is **denied** as moot.

4 (4) The Clerk of Court must enter judgment of dismissal accordingly.

5 DATED this 31st day of March, 2010.

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9 G. Murray Snow
10 United States District Judge
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